No. 06-1239

APR 17

In The

# Supreme Court of the United States

RAD W. HAMILTON,

*Petitioner,*

v.

ENTERPRISE LEASING COMPANY OF ST. LOUIS,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit**

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

To the extent any of the questions presented by Petitioner are sufficiently intelligible or state any issues to be resolved on appeal, they do not form a valid basis for review by this Court. Moreover, Petitioner overstates the purported issues in the hope of creating some reason for this Court to grant review. To the best of Respondent's ability to determine, Petitioner alleges the following question presented:

Whether the United States Court of Appeals for the Eighth Circuit erred in affirming the District Court's grant of Respondent's motions to dismiss and for summary judgment on Petitioner's claims for sex, age, national origin and reverse race discrimination.

In the event this Court determines that Petitioner has raised other questions for review, Respondent respectfully reserves and requests the opportunity to respond to those questions.

## CORPORATE DISCLOSURE STATEMENT

Enterprise Leasing Company of St. Louis is a wholly-owned subsidiary of Enterprise Rent-A-Car Company, a Missouri corporation. Enterprise Leasing Company of St. Louis has no subsidiaries not wholly-owned, and there is no publicly-held company that owns 10% or more of the stock of Enterprise Leasing Company of St. Louis.

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## STATEMENT OF THE CASE

Respondent hired Petitioner, a white male, at the age of fifty-six. *See* Petitioner's Appendix at page 34, hereinafter referred to as "PA at __". He started in the entry level position in the rental division of Respondent, which includes the familiar stand-alone facilities where customers rent or lease vehicles. *Id.* In November 1999, Petitioner requested a leave of absence, which Respondent granted. *Id.* Respondent also provided Petitioner with a $3,000 loan at that time. *Id.* at 35. Upon his return in January 2000, Petitioner was offered a similar available position in the rental division, which he declined because he felt it was too far away from his home. *Id.* Petitioner opted to return to an available entry level position in the callback division of Respondent. *Id.*

Petitioner thereafter unsuccessfully sought many rental division manager promotions during his employment with Respondent. He argues that he was not promoted or given the opportunity to take an internal test – called the MA test – which makes one eligible for promotion to a higher level position. PA at 35-36. Petitioner was always told that to be promoted to rental division manager he had to go back to the rental division to obtain the necessary skills and experience, which was a requirement to be able to take the MA test and be promoted to a rental division manager position. *Id.* Nevertheless, Petitioner flatly refused to return to the rental division. *Id.*

No entry level callback division employee has been allowed to take the MA test or been promoted directly into a rental division manager position, both facts that Petitioner freely admitted. PA at 35-36. Consequently, Petitioner does not allege that any younger employees in the

callback division were treated more favorably than he was. *Id.* at 35. Petitioner does not allege that any entry level callback center employee was provided study materials for the MA test. *Id.* at 36.

Petitioner sought only one promotion within the year prior to the date he filed his charge questionnaire against Respondent on March 9, 2004. *Id.* at 36. That position, as all others that were available during the year prior to the date Petitioner filed his questionnaire, was filled by an individual who had passed the MA test and was working in the rental division. *Id.* at 36-37.

Petitioner alleges that during a conversation in March 2001, Keith Hoeferlin (his supervisor at that time) told him that he was too slow and a younger colleague was faster and "can whip through call backs faster." PA at 40. Respondent investigated the claim and found no evidence to support Petitioner's allegation. *Id.* Moreover, Mr. Hoeferlin had no supervisory authority over Petitioner after September 2003, and no involvement with any promotion Petitioner sought in the final year of his employment or the later decision (addressed below) to place him on probation. *Id.* Mr. Hoeferlin never had a role in selecting individuals to take the MA test. *Id.* Petitioner admitted that neither Mr. Hoeferlin nor any other individual employed by Respondent ever made any age-related comments to him either before or after the alleged statement by Mr. Hoeferlin in 2001. *Id.*

During his employment with Respondent, Petitioner also was a member of the Diversity Team that was assembled to consider issues regarding workplace diversity for Respondent. *See* PA at 38. In November 2003, Respondent restructured the Diversity Team, requiring that all members

be Level II employees, obtain a recommendation for the team from their managers, and have received "meets requirements" or better on their most recent evaluation. *Id.* Respondent also reduced the number of members from thirteen to seven, replacing all members, including Petitioner, except for the manager of the team and one other employee. *Id.* Petitioner has admitted that his removal from the team had nothing to do with his race. *Id.*

In March 2004, after several recent complaints about Petitioner's performance and having been issued various disciplinary memoranda, Petitioner was ultimately told he was being placed on probation. *See* PA at 39. Petitioner was alternatively offered a severance agreement with five weeks' pay if he wanted to resign. *Id.* at 40. Petitioner opted to resign but then refused to sign the severance agreement. *Id.* Respondent still paid Petitioner the severance pay. *Id.*

## SUMMARY OF THE ARGUMENT

The Court should deny Petitioner's petition for a writ of certiorari. The Eighth Circuit properly held that Petitioner's allegations failed to state a claim for discrimination as a matter of law and applied well-settled, correct standards of law in doing so.

Petitioner has failed to present any compelling reasons to justify his petition for a writ of certiorari. Despite Petitioner's misguided and unsupported assertions to the contrary, the Eighth Circuit's decision does not conflict with any precedent from this Court or any of the Courts of Appeals. Petitioner simply disagrees with the Eighth Circuit's application of well-settled law (which is in harmony with

the precedent from this Court and all other Courts of Appeals) to his particular facts. Petitioner's petition should be denied.

Upon Respondent's motion to dismiss at the outset of this litigation, the District Court correctly ruled that the majority of Petitioner's claims were untimely under the Age Discrimination in Employment Act ("ADEA"), 23 U.S.C. §621 *et seq.*, and that he failed to properly administratively exhaust other purported claims under that statute and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq.* The District Court properly also ruled that Petitioner's claims for sex, age and national origin discrimination are not covered under §1981 as he had alleged. All that remained were age discrimination claims under the ADEA that alleged conduct occurring within 300 days of Petitioner's filing of his charge questionnaire, and Petitioner's claim for reverse race discrimination under §1981, alleging conduct occurring within four years of the filing of his complaint.[1]

Following discovery, the District Court properly granted Respondent's motion for summary judgment as to Petitioner's remaining claims of age and reverse race discrimination. As the District Court and the Eighth Circuit properly found, Petitioner failed to establish even a *prima facie* case of discrimination as to his allegations of failure to promote and other discrimination. In particular,

[1] For some reason, Petitioner suggests in his petition that the Eighth Circuit inappropriately dismissed his claims under §1981 for a failure to exhaust his administrative remedies, which would be a valid argument had that been the basis for the Eighth Circuit's or the District Court's opinions. However, it is clear that this was not a part of either court's decision in this case and supports no basis for review.

it is undisputed that Petitioner was not qualified for any promotion he sought, and it is undisputed that there is no similarly situated individual younger than Petitioner or non-white who was treated more favorably than Petitioner.

Similarly, Petitioner's claim of constructive discharge fails as a matter of law. His working conditions were not intolerable, and regardless had nothing to do with his age or race. Accordingly, Petitioner's claims fail as a matter of law.

## ARGUMENT

Petitioner has not presented any compelling reasons for review. Despite his bald assertions to the contrary, the decision of the Eighth Circuit does not conflict with any precedent from this Court or any Courts of Appeals. The Eighth Circuit applied well-settled principles of law that have been endorsed by this Court and every other Court of Appeals. Petitioner simply disagrees with the application of those principles to the facts of his case despite having failed to satisfy his burdens of proof.

### I. PETITIONER HAS FAILED TO IDENTIFY HOW THE EIGHTH CIRCUIT'S DECISION CONFLICTS WITH ANY RULINGS OF THIS COURT OR ANY COURTS OF APPEALS.

Petitioner has failed to identify any compelling reasons for review as required by Supreme Court Rule 10, despite his vague references to a decision from this Court in June 2006 and random excerpts from several Courts of

Appeals that he claims conflict with the underlying decision of the Eighth Circuit Court of Appeals.[2]

Under Supreme Court Rule 10, the only general bases under which Petitioner could argue for review include:

1) The Eighth Circuit's decision is in conflict with another court of appeals, a state court of last resort regarding an important federal question, or that so far departs from the usual course of judicial proceedings that warrants the exercise of the Court's supervision; or

2) The Eighth Circuit's decision involves an important federal question and conflicts with relevant decisions of this Court.

*See* SUP. CT. RULE 10(a)-(c).

Petitioner has failed to satisfy either of the general bases described above and has offered no other basis to warrant review by this Court.

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[2] Several times in his petition, Petitioner refers to a June 2006 decision from this Court regarding retaliation in employment, sometimes referring to June 22, 2006, sometimes to June 23, 2006, and sometimes June 26, 2006. For the purposes of this response, Respondent assumes that Petitioner was referring to the decision in *Burlington N. and Santa Fe Ry. v. White*, 126 S.Ct. 2405 (2006), which was decided on June 22, 2006.

Interestingly, amongst the random collection of quotes from several Courts of Appeals Petitioner claims conflict with the decision of the Eighth Circuit in this case, he includes at least one case from the Eighth Circuit itself. *See* Petition for Writ of Certiorari at 2-3, hereinafter referred to as "Petition at p. __". This inconsistency illustrates the frivolous nature of Petitioner's petition.

Notwithstanding his vague references to the decision in *Burlington N. and Santa Fe Ry. v. White*, 126 S.Ct. 2405 (2006), Petitioner has failed to identify how the underlying decision of the Eighth Circuit conflicts with this recent precedent. Regardless of Petitioner's thin comparison, the ruling in *Burlington* is simply inapposite to any portion of the Eighth Circuit's underlying decision. Moreover, again, Petitioner has not articulated any conflict between these two cases.[3]

Finally, Petitioner cites to several random cases from a number of Courts of Appeals for the proposition that summary judgment should seldom be granted in an employment discrimination case that involves issues of intent, motive, etc. *See* Petition at p. 2-3. However, nothing

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[3] Though Petitioner checked the box for retaliation in his Equal Employment Opportunity Commission ("EEOC") charge questionnaire, he never included a claim for retaliation in his complaint before the District Court and never raised any allegations or facts supporting a claim for retaliation in any of his many pleadings filed with that court. Indeed, it was not until more than **eight months *after* the District Court entered summary judgment** dismissing Petitioner's claims that he raised allegations of retaliation for the first time in this proceeding, explicitly based on this Court's decision in *Burlington*. *See* Petitioner's Amended Brief to Eighth Circuit Court of Appeals, dated June 23, 2006, in Respondent's Appendix at page 14.

In his petition, Petitioner now claims that this case is all about "**RETALIATION**", despite never having raised that argument with the District Court. *See* Petitioner's Petition for a Writ of Certiorari at page 9. As this Court is well aware, Petitioner cannot raise claims for the first time on appeal. Nevertheless, had Petitioner properly raised this argument with the lower court, the evidence clearly demonstrates that he has neither alleged, nor offered any evidence to support, any facts evidencing unlawful retaliation. Petitioner's transparent (and improper) attempt to capitalize on recent case law – inapposite to his own claims – underscores the frivolousness of his original claims, appeal and petition for a writ of certiorari.

in the Eighth Circuit's underlying decision conflicts with this precedent (some of which is quoted from the Eighth Circuit). As this Court has always held, even with the precedent cited by Petitioner, courts are free to grant summary judgment in employment discrimination cases when there is no issue of material fact and the circumstances warrant such a decision. Petitioner does not argue that the Eighth Circuit applied any standards in conflict with other Courts of Appeals or this Court. He simply disagrees that his facts warrant the grant of summary judgment. Petitioner's argument does not warrant review by this Court.

## II. THE EIGHTH CIRCUIT CORRECTLY DETERMINED THAT PETITIONER'S ALLEGATIONS FAILED TO STATE A CLAIM AS A MATTER OF LAW.

### A. Several of Petitioner's allegations of employment discrimination were either untimely or had not been exhausted through the administrative process and thus are prohibited as a matter of law.

#### *1. Petitioner failed to exhaust his administrative remedies with respect to several allegations of race, sex, and national origin discrimination under Title VII.*

Ruling on Respondent's Motion to Dismiss, the District Court properly held that Petitioner's claims of sex, race and national origin discrimination under Title VII were invalid because he failed to exhaust his administrative remedies as to those claims. In order to successfully maintain claims under Title VII, a plaintiff must first pursue those claims through the administrative charge

process of the EEOC within 300 days of the alleged discriminatory conduct. 42 U.S.C. §2000e-5(e)(1); *EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 110-12 (1988); *Shannon v. Ford Motor Co.*, 72 F.3d 678, 684 (8th Cir. 1996). If a plaintiff were allowed to bring a claim outside the scope of the EEOC charge, it would "circumscribe the EEOC's investigatory and conciliatory role, as well as deprive the charged party of notice of the charge. . . ." *Williams v. Little Rock Mun. Water Works*, 21 F.3d 218, 223 (8th Cir. 1994). Petitioner did not assert claims of sex, race or national origin discrimination in his charge questionnaire. Therefore, Petitioner cannot pursue such claims here. *Shannon*, 72 F.3d at 684-86.

Courts recognize claims as exhausted when they have been actually filed before the EEOC or when they are "like or reasonably related to the allegations of the [administrative] charge." *Anderson v. Block*, 807 F.2d 145, 148 (8th Cir. 1986). This Court has held that claims are deemed to be like or reasonably related when they "could reasonably be expected to grow out of the charge of discrimination." *Cobb v. Stringer*, 850 F.2d 356, 359 (8th Cir. 1988) (quoting *Griffith v. Carlin*, 755 F.2d 1516, 1522 (11th Cir. 1985)). In response, Petitioner argues that these claims are reasonably related because the EEOC issued a right to sue letter on his ADEA claims. It is unclear why Petitioner believes the issuance of a right to sue letter on ADEA claims has any bearing on the relationship of those claims to claims brought under Title VII. At a minimum, Petitioner has done nothing to explain that relationship or how the District Court's dismissal was improper because of the right to sue letter.

In its order dismissing Petitioner's claims, the District Court held that it was clear from Petitioner's charge

questionnaire that he did not present any claims of race, sex, or national origin discrimination to the EEOC. *See* Respondent's Appendix at page 6, hereinafter referred to as "RA at p. __". It further held that Petitioner's claims of race, sex, and national origin discrimination under Title VII were not like or reasonably related to the allegations in the administrative charge questionnaire. *Id.* Failure to pursue the administrative remedies to the extent required by the statute operates as a bar to judicial relief. *Miller v. Runyon*, 32 F.3d 386 (8th Cir. 1994); *see Briley v. Carlin*, 172 F.3d 567, 572-73 (8th Cir. 1999) (affirming grant of summary judgment based on failure to exhaust administrative remedies, as failure to promote claim was not related to plaintiff's EEOC complaint concerning reduced duties). Accordingly, the District Court's dismissal (and the Eighth Circuit's corresponding affirmance) of Petitioner's Title VII claims not raised before the EEOC cannot provide the basis for review by this Court.

***2. Petitioner also failed to exhaust his administrative remedies with respect to several allegations of age discrimination under the ADEA that occurred more than 300 days prior to the date of his charge questionnaire.***

Similar to its ruling on the Title VII claims discussed above, the District Court and the Eighth Circuit properly held that in order to bring a claim of age discrimination under the ADEA, a plaintiff must file a charge of discrimination regarding the alleged unlawful conduct within 300 days of it. *See* RA at p. 7; *Dorsey v. Pinnacle Automation Co.*, 278 F.3d 830, 835 (8th Cir. 2002). All discrete acts of

discrimination occurring prior to 300 days before the filing of a charge are deemed untimely and invalid. *Id.*

The timely filing of a charge of discrimination with the EEOC is not a jurisdictional prerequisite to an action under the ADEA, but rather is treated like a statute of limitations and is subject to waiver, estoppel and equitable tolling. *Dring v. McDonnell Douglas Corp.*, 58 F.3d 1323, 1327 (8th Cir. 1995). If a plaintiff fails to file a timely charge, his action is barred unless he can demonstrate that the limitations period is subject to equitable modification. *Id.*

Following this Court's precedent, the District Court properly found that denial of a promotion is a discrete event and not a continuing violation. *See* RA at pp. 7-8. "Discrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify. Each incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable 'unlawful employment practice.'" *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114 (2002). Although Petitioner alleged that Respondent discriminated against him for four years, he could only file a charge to cover discrete acts that occurred within the timely filing period. *Id.*

The District Court noted that Petitioner's charge states that he applied for nine different positions, but does not provide the dates when he was denied each promotion. *See* RA at p. 8. Petitioner's complaint states that during the period from June 1, 1999 through March 1, 2004, he was denied approximately eight promotion opportunities. Petitioner has not exhausted his administrative remedies with respect to any failure to promote claims for any

denials of promotions that occurred more than 300 days prior to the filing of his EEOC charge questionnaire, and the District Court's dismissal (and the Eighth Circuit's affirmance) of those allegations is proper and does not provide a basis for review by this Court.

### *3. The District Court and the Eighth Circuit further properly held that Section 1981 does not encompass Petitioner's claims for alleged sex, age and national origin discrimination.*

The District Court's Memorandum and Order dismissing Petitioner's improper §1981 claims correctly applied the law to the facts of this case. Section 1981 covers purely private acts of discrimination in the making and enforcement of contracts. 42 U.S.C. §1981(a); *Griffin v. Pinkerton's, Inc.*, 173 F.3d 661, 664 (8th Cir. 1999). "Since the enactment of the 1991 Civil Rights Act, this provision has provided a basis for suits against employers for racial harassment on the job." *Id.* Although the typical §1981 case involves discrimination against a minority race, the statute also protects white citizens from racial discrimination. *McDonald v. Santa Fe Trail Transp.*, 427 U.S. 273, 286-87 (1976).

The District Court and the Eighth Circuit properly found that Petitioner cannot recover for sex, age or national origin discrimination under §1981. *See* RA at p. 10. Section 1981 does not apply to discrimination based on sex. *Runyon v. McCrary*, 427 U.S. 160, 167 (1976). Also, a plaintiff cannot recover under §1981 for discrimination based solely on the place or nation of his origin. *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 613 (1987). There is also no history of the statute being applied to age

discrimination claims. The District Court's and Eighth Circuit's dismissal of Petitioner's §1981 claims cannot provide a basis for review.

### B. Petitioner's remaining, timely allegations of age discrimination fail. Petitioner admitted that he failed to meet necessary qualifications for advancement, and he admitted that his age was not a factor in his resignation.

The grant of summary judgment dismissing Petitioner's remaining timely claims of age discrimination was proper. Petitioner claims that within the 300 days prior to the filing of his charge questionnaire, he experienced the following unlawful acts due to his age: (1) he was denied one rental division manager promotion that he sought; (2) he was denied a request to take the MA test; (3) he was denied study materials for the MA test; and (4) he was forced to resign. The District Court properly found that Petitioner cannot establish a viable claim of age discrimination as to any of these incidents.

Petitioner lacks any direct evidence of age discrimination and had to pursue his claim of age discrimination under the indirect, burden-shifting method. *See Breeding v. Arthur J. Gallagher & Co.*, 164 F.3d 1151, 1156 (8th Cir. 1999). Under the indirect, burden-shifting method of proof, Petitioner must first establish a *prima facie* case of age discrimination. *Id.* If he can, the burden switches to Respondent to put forth a legitimate, non-discriminatory explanation for the alleged discriminatory conduct. *Id.* Then Petitioner must meet his ultimate burden and demonstrate that Respondent's explanation is untrue, and the real reason is intentional age discrimination. *Id.* The District Court and the Eighth Circuit correctly found that

Petitioner lacks any evidence to meet either of his burdens of proof.

To establish a *prima facie* case of age discrimination under the ADEA, a plaintiff must demonstrate that (1) he is within the protected class; (2) he was qualified to perform the job; (3) he suffered an adverse employment action; and (4) nonmembers of his class were not treated the same. *See Breeding*, 164 F.3d at 1156. Petitioner cannot meet this burden as to any alleged discriminatory acts.

1. ***An alleged ageist statement from Petitioner's former supervisor cannot stand as direct evidence of age discrimination because it was a stray remark and allegedly occurred three years before the conduct at issue.***

As evidence of age discrimination, Petitioner contends that in March 2001 his former supervisor, Keith Hoeferlin, told him that he was "too old and too slow and Matt [a younger colleague of Petitioner] is younger and faster and can whip through call backs faster." *See* Petition at p. 4. Even if this statement was actually made, it does not constitute evidence of age discrimination, much less direct evidence, which could support Petitioner's claims.

The District Court properly articulated two bases for its rejection of Petitioner's position that this statement is direct evidence of discrimination. *See* PA at p. 42. First, Mr. Hoeferlin was not a decisionmaker with respect to the decisionmaking process at issue in this case. *Id.*; *Breeding*, 164 F.3d at 1157 (holding that statements and actions by nondecisionmakers are insufficient as a matter of law to

support a claim of age discrimination). Mr. Hoeferlin was not Petitioner's supervisor when the alleged discriminatory conduct occurred, and he had no role in any of the complained of situations. *See* PA at p. 42; *Yates v. McDonnell Douglas*, 255 F.3d 546, 549 (8th Cir. 2001) (conduct of individuals not involved in employment decisions is insufficient to support a claim of age discrimination).

To constitute direct evidence of discrimination, there must be a *causal link* between the statement and the allegedly discriminatory conduct. *See Hutson v. McDonnell Douglas Corp.*, 63 F.3d 771, 779 (8th Cir. 1995). Statements made by nondecisionmakers, and statements made by decisionmakers that are unrelated to the allegedly discriminatory decision, are merely stray remarks, which cannot support a claim of discrimination, even circumstantially. *See Gartman v. Gencorp, Inc.*, 120 F.3d 127, 131 (8th Cir. 1997). Despite his unsupported assertions that Mr. Hoeferlin was his supervisor, Petitioner fails to support any claim that Mr. Hoeferlin was his supervisor *with respect to the decisionmaking process at issue in this case.* Because he was a nondecisionmaker, Mr. Hoeferlin's alleged comment is nothing more than a stray remark, as the District Court and the Eighth Circuit correctly held.

Second, the District Court and the Eighth Circuit properly found that the three-year span of time between the alleged statement and the employment actions at issue also shows there is not a connection between the two. *See* PA at p. 42-43. The comment is a stray remark and falls short of the standard required for circumstantial or direct evidence, even if Mr. Hoeferlin was a decisionmaker, which he was not. *See Walton v. McDonnell Douglas Corp.*, 167 F.3d 423, 427 (8th Cir. 1999) (statement by supervisor two years before he was involved in the employment decision

was too remote in time to support claim of discrimination); *Simmons v. OCé-USA, Inc.*, 174 F.3d 913, 916 (8th Cir. 1999) (holding similarly); *Aucutt v. Six Flags Over Mid-Am., Inc.*, 85 F.3d 1311, 1316 (8th Cir. 1996) (holding similarly regarding comment made fourteen months prior to adverse action at issue).

The isolated nature of the alleged comment of Mr. Hoeferlin further diminishes any evidential value. "Not every prejudiced remark made at work supports an inference of illegal employment discrimination." *See Rivers-Frison v. Southeast Mo. Cmty. Treatment Ctr.*, 133 F.3d 616, 619 (8th Cir. 1998); *see also Sprenger v. Fed. Home Loan Bank of Des Moines*, 253 F.3d 1106, 1113 (8th Cir. 2001) (in the age discrimination context, "as in all areas of discrimination law, we hesitate to rely on isolated comments as proof of bias, lest the law become a 'general civility code'"). Petitioner has admitted that neither Mr. Hoeferlin nor anyone else at Respondent ever made any age-related comments to him either before or after the alleged statement by Mr. Hoeferlin in March of 2001. Therefore, Mr. Hoeferlin's remote comment cannot constitute evidence of age discrimination.[4]

In his Petition to this Court, Petitioner incorrectly asserts that Mr. Hoeferlin's alleged statement is direct

[4] Any alleged causal link between the employment decisions Plaintiff complains about and the statement allegedly made by Mr. Hoeferlin is also undercut by Respondent's hiring of Plaintiff when he was fifty-six years old. *See Sprenger*, 253 F.3d at 1113 (holding that a comment about "teaching old dogs new tricks" is less probative of discrimination when weighed against the plaintiff's hiring at fifty-two and then allegedly suffered discrimination for being too old just four years later).

evidence of age discrimination because it and the decisionmaking process at issue in this case established a continuing violation. *See* Petition at p. 11. The District Court found that Petitioner had only alleged discrete acts of discrimination. *See* PA at p. 43. "Discrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify. Each incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable 'unlawful employment practice.'" *Nat'l R.R.*, 536 U.S. at 114.

As stated by the District Court, Petitioner's actionable allegations described separate discrete acts. *See* PA at p. 43. Only the acts occurring within the 300 days prior to Petitioner's charge questionnaire are actionable, so Mr. Hoeferlin's alleged comment is a stray remark and not relevant to Petitioner's actionable claims. Fatally absent from Petitioner's ramblings to this Court about continuing violations and career contamination is any attempt to rebut the reasons given by Respondent and endorsed by the District Court. Accordingly, this cannot provide the basis for review.

2. ***Petitioner cannot establish a prima facie case of age discrimination for failure to promote because he admitted he was not qualified for the position, no similarly situated employee outside of his protected group was given the position, and he cannot refute Respondent's legitimate, non-discriminatory reasons for its actions.***

The District Court and the Eighth Circuit correctly found that Petitioner cannot meet the second or fourth *prima facie* elements regarding the one promotion at issue

in this case. *See* PA at p. 45. Petitioner was not qualified for that position, the second *prima facie* element, in that he had not taken and passed the MA test. As stated by the District Court, Petitioner has explicitly admitted that he needed to have successfully completed the MA test to be eligible for that or any rental manager promotion. *See* PA at p. 44-45. Thus, Petitioner's claim necessarily fails. *See Kratzer v. Rockwell Collins, Inc.*, 398 F.3d 1040, 1046-47 (8th Cir. 2005) (affirming summary judgment against employee who could not "show that her qualifications are equivalent to the minimum objective criteria" because she had not passed and was not qualified to take a necessary test for promotion); *Breeding*, 164 F.3d at 1158.

In his petition to this Court, Petitioner blames Respondent's counsel's "gamesmanship" for manufacturing an admission that he was not qualified for the promotion he sought. *See* Petition at p. 16. Of course, Petitioner later admits – again – that he needed to have passed the MA test to be qualified for the promotion he sought. *See* Petition at 18. Without this essential element that Petitioner admits he did not have, the District Court and the Eighth Circuit were correct in holding that Petitioner's own belief that he was independently qualified for the position was immaterial. *See* PA at p. 45.

As an additional basis for finding Petitioner did not satisfy his *prima facie* burden, the District Court and the Eighth Circuit found that Petitioner could not demonstrate that similarly situated individuals outside the protected class were treated more favorably than he, the fourth *prima facie* requirement. *See* PA at p. 45. Petitioner admitted that every individual he contends was promoted to a rental division manager position instead of him had taken the MA test and was at the time working in the

rental division. *See* PA at p. 45. Also, no other employee in an entry level callback division position, Petitioner's position, was promoted directly to a rental division manager position. *Id.* The individual promoted to the rental division manager position at issue had taken and passed the MA test and worked in the rental division. *Id.* Petitioner does not even contest this point.

In fact, Petitioner does not even allege that any specific younger employees in the callback division were treated more favorably than he was. *See* PA at p. 45. As a result, the District Court and the Eighth Circuit correctly held that Petitioner failed to meet his burden of proof as to his promotion claim. *See* PA at p. 45; *Harlston v. McDonnell Douglas Corp.*, 37 F.3d 379, 383 (8th Cir. 1994) (granting summary judgment to employer where plaintiff admitted she could not identify any similarly situated individuals who received better treatment).

Even if Petitioner could establish a *prima facie* case, Respondent has articulated a legitimate, nondiscriminatory reason for its actions, which Petitioner has failed to show is a pretext for discrimination. As discussed earlier, Petitioner was not qualified for the position at issue. Failure to meet minimum requirements for a position is a legitimate, nondiscriminatory reason for denial of a promotion. Petitioner presented no evidence that age discrimination actually motivated Respondent in its decision not to promote him. Moreover, at no point has Petitioner shown that an employee was promoted without having passed the MA test and been working in the rental division. Therefore, the District Court's grant of summary judgment (and the Eighth Circuit's affirmance) on this point does not warrant review by this Court.

### 3. *Petitioner cannot establish a prima facie case of age discrimination against Respondent for not allowing him to take the MA test or providing him study materials because Petitioner was not qualified to take the test or receive the study materials.*

For the same reasons that applied to Petitioner's failure to promote claim, the District Court correctly found that Petitioner also failed to establish a *prima facie* case regarding his claim of not being selected to take the MA test. *See* PA at p. 46-47. Petitioner was not qualified to take the MA test because he refused to work in the rental division, a fact that he has admitted was a requirement to be selected to take the MA test. *Id.*

Petitioner was offered several chances to work in the rental division because it was a requirement to take the MA test. *See* PA at 35, 36. Petitioner, aware of this fact, refused every invitation and does not contest this point. *Id.* The District Court and the Eighth Circuit recognized and agreed that this unwillingness to work in the rental division was the real reason Petitioner was not allowed to take the MA test. *See* PA at p. 46. Being unqualified to take the MA test, Petitioner could not establish his *prima facie* case. *Calder v. TCI Cablevision of Mo.*, 298 F.3d 723, 730 (8th Cir. 2002).

Likewise, the District Court and the Eighth Circuit also found that Petitioner had not shown that similarly situated individuals outside the protected class were allowed to take the MA test. *See* PA at p. 46. Petitioner does not dispute that no one in his position was allowed to take the MA test. *See* PA at 46-47. Petitioner was treated identically to his younger, similarly situated colleagues.

The District Court was correct in holding that Petitioner's claim thus must fail as a matter of law. *See Harlston*, 37 F.3d at 383.

Petitioner's bootstrap claim that he was denied study materials related to the MA test is also without merit. As stated by the District Court, "[t]he MA study materials were only given to [Respondent's] employees selected to take the MA test, and the MA test was only given to employees in the rental division." *See* PA at p. 46.

Regardless, denial of the study materials is not an adverse action, the third *prima facie* element of a claim for employment discrimination. *See Breeding*, 164 F.3d at 1156. *See also Higgins v. Gonzales*, Case No. 06-2556, 2007 WL 817505, *4-7 (8th Cir., Mar. 20, 2007) (any of a variety of adverse actions alleged by the plaintiff, either by themselves or in the aggregate, are insufficient to support a claim for employment discrimination because they did not represent a material employment disadvantage); *Spears v. Mo. Dep't of Corr. and Human Res.*, 210 F.3d 850, 853 (8th Cir. 2000) (stating that an adverse employment action is a "tangible change in working conditions that produces a material employment disadvantage" such as "[t]ermination, reduction in pay or benefits, and changes in employment that significantly affect an employee's future career prospects"); *Ledergerber v. Stangler*, 122 F.3d 1142, 1144 (8th Cir. 1997) (court held that actions that have only a tangential effect on plaintiff's employment do not rise to the level of an ultimate employment decision).

This claim further fails because as of the fall of 2003, Respondent stopped generating and supplying study materials for the MA test. *See* PA at 35-36. Thus, the study materials were not even disseminated during a large part

of the relevant time period at issue. There is no credible evidence that after the fall of 2003, Respondent supplied study materials to any employee, much less a similarly situated employee. For all of these reasons, the District Court's grant of summary judgment on Petitioner's allegations regarding the MA test and study materials (and the Eighth Circuit's affirmance) cannot provide the basis for review by this Court.

***4. Petitioner's removal from the diversity team was not an act of unlawful discrimination because it was not an adverse employment action that presented any tangible change in working conditions or produced any material employment disadvantage.***

Again, the District Court properly found that Petitioner failed to make a *prima facie* case, this time regarding his removal from the Diversity Team. *See* PA at p. 47-48. Removal from the Diversity Team is not an adverse employment action. *Id.* An adverse employment action is a tangible change in working conditions that produces a material employment disadvantage. *Id.*; *see Fisher v. Pharmacia & Upjohn*, 225 F.3d 915, 919 (8th Cir. 2000) (ADEA case); *Higgins*, 2007 WL 817505 at *4-7 (Title VII case). "Termination, cuts in pay or benefits, and changes that affect an employee's future career prospects are significant enough to meet the standard. . . . Minor changes in duties or working conditions, even unpalatable or unwelcome ones, which cause no materially significant disadvantage" are not adverse employment actions. *Id.* at *4 (internal citations omitted).

The District Court and the Eighth Circuit agreed that Petitioner produced no evidence that removal from the Diversity Team changed any of his work conditions. *See* PA at p. 47-48. Membership on the Diversity Team was not a required work activity. *Id.* Further, the number of Diversity Team members was reduced from thirteen to seven, and only two members remained after the restructuring. *Id.* Petitioner was one of eleven people removed from the Team, and he offered no evidence that the two remaining members were similarly situated employees treated more favorably than he was or that there was age discrimination. *Id.*

Also, additional requirements for team membership were adopted after the restructuring, and Petitioner did not meet those requirements – a point which Petitioner does not contest. *Id.* Petitioner's removal from the Diversity Team does not warrant review.

***5. Petitioner's claim for constructive discharge also must fail because he failed to show either that his working conditions were intolerable or that he took any steps to make those conditions more tolerable.***

Petitioner's claim of forced resignation also fails. Notably, Petitioner offers no arguments in his petition that would refute the District Court's offered rationale for this finding. For Petitioner to succeed on this claim he must demonstrate that he was constructively discharged. This is a high burden of proof and one that Petitioner cannot meet.

To demonstrate constructive discharge, a plaintiff must show the employer "deliberately made or allowed

[his] working conditions to become so intolerable that the employee had *no other choice* but to quit." *Jones v. Fitzgerald*, 285 F.3d 705, 715-16 (8th Cir. 2002) (emphasis in original); *Phillips v. Taco Bell Corp.*, 156 F.3d 884, 890 (8th Cir. 1998). Petitioner must show that his employer intentionally forced him to quit his job – and did so because of his age – by creating intolerable working conditions. *Phillips*, 156 F.3d at 890. Petitioner must demonstrate that a reasonable person would feel compelled to resign under his alleged working conditions. *See Spears,* 210 F.3d at 854-55. The circumstances here do not support such a claim, and Petitioner has never offered any evidence that could meet such a high burden.

The District Court found that on March 2, 2004, Petitioner received a performance memorandum stating that he was being placed on probation for ninety days. *See* PA at p. 49. The memorandum cautioned that if Petitioner failed to meet or surpass the group's fiscal year average or caused any additional complaints from customers or colleagues, disciplinary action would be taken up to and including termination of employment. *Id.* Petitioner was verbally given the option to resign with five weeks severance pay. *Id.* at 49-50. Petitioner chose to resign, but did not sign the severance agreement. *Id.* Respondent still paid Petitioner the severance pay. *Id.*

Against this backdrop, the District Court and the Eighth Circuit properly held that Petitioner cannot demonstrate that his working conditions were intolerable. Essentially, Petitioner contended that he felt he would not be able to complete the probationary period without incurring further complaints about his performance. Petitioner is not entitled to speculate that the worst outcome would have resulted. *Phillips,* 156 F.3d at 890

("an employee has an obligation not to assume the worst and jump to conclusions too quickly. An employee who quits without giving [his] employer a reasonable chance to work out a problem has not been constructively discharged") (internal citations omitted). Put another way, friction between Petitioner and his superiors over his job performance is insufficient to support a constructive discharge claim. *See, e.g., Bradley v. Widnall*, 232 F.3d 626, 632 (8th Cir. 2000) (holding problems resulting from inter-office politics and personality conflicts insufficient to support Title VII claim).

Additionally, that Petitioner was denied promotions during his employment at Respondent also cannot sustain his claim. Not being promoted does not make one's working conditions intolerable. *See, e.g., Breeding,* 164 F.3d at 1159 (denial of promotion was insufficient to support constructive discharge claim). Petitioner simply lacks any credible evidence whatsoever suggesting that his working conditions were intolerable and that he was forced to resign. *See, e.g., Howard v. Burns Bros., Inc.*, 149 F.3d 835, 841-42 (8th Cir. 1998) (to prove constructive discharge the workplace must be severely contaminated with discriminatory acts and there must be a lack of recourse for the employee).

Even if Petitioner could show that he was forced to resign his position, he lacks any evidence that Respondent forced him to resign *because of his age*. According to Petitioner, he resigned because he felt the complaints about him (that led to his probation) would continue and lead to his discharge, and that the complaints were due strictly to his position and a co-worker who was out to get him because of the position he held. *See* PA at p. 38-39. According to Petitioner, this employee wanted Petitioner's

call-center to fail, and he was more or less caught in the middle. *Id.* Petitioner agrees that neither his co-worker's motivation nor the position he was in were attributable to his age. *Id.* Accordingly, the District Court's grant of summary judgment on this point (and the Eighth Circuit's affirmance) does not warrant review.

### C. Finally, Petitioner's claim of reverse race discrimination also fails as a matter of law. Petitioner lacks any evidence that Respondent discriminated against him because he is Caucasian.

Lastly, Petitioner contends that he was discriminated against by Respondent because he is Caucasian. Because §1981 does not have a charge-filing requirement, Petitioner could pursue such a claim, despite that he never claimed such discrimination in his charge questionnaire. However, there is a four-year statute of limitations, so Petitioner can only pursue instances of alleged discrimination occurring within four years of the filing of his lawsuit. *Jones v. R.R. Donnelly & Sons Co.*, 541 U.S. 369, 382 (2004). Petitioner's minimal allegations in this regard, like his allegations of age discrimination, are entirely without merit.

Petitioner claims that within the four years prior to the filing of his complaint, he experienced the following unlawful acts due to his race: (1) other non-Caucasians were promoted before him; (2) he was denied study materials for the MA test because of his race; and (3) he was pulled off of the Diversity Team at Respondent because of

his race. Petitioner cannot establish a viable claim of reverse race discrimination as to any of these incidents.[5]

As with his claim of age discrimination, the District Court properly determined that Petitioner must pursue his claim of race discrimination under the indirect, burden-shifting method. *See* PA at p. 51; *see Saulsberry v. St. Mary's Univ. of Minn.*, 318 F.3d 862, 866 (8th Cir. 2003) (holding that the elements of a §1981 claim are the same as that under discrimination statutes like the ADEA). But because Petitioner is claiming *reverse* race discrimination, he must also prove (in addition to the four *prima facie* elements discussed earlier) a fifth element. Petitioner must present additional evidence of reverse race discrimination at Respondent – i.e., "background circumstances that support the suspicion that the defendant is that unusual employer who discriminates against the majority." *See Duffy v. Wolfe*, 123 F.3d 1026, 1036 (8th Cir. 1997).

Demonstration of these "background circumstances" is a high burden. *See Hammer v. Ashcroft*, 383 F.3d 722, 725 (8th Cir. 2004) (employer's affirmative efforts to recruit minority and female applicants, through a written memorandum stating that "it might be advisable to consider a minority," is not sufficient evidence of background circumstances for a discrimination plaintiff to satisfy her *prima facie* burden). Petitioner lacks any such evidence to satisfy this burden.

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[5] It is unclear whether Petitioner contends that his removal from the Diversity Team is an act of race discrimination. In his deposition, he stated that he was removed, "[b]e it black, white, red, green or purple, that was how I took it at that time." PA at 53. Respondent and the Courts nevertheless addressed it.

At best Petitioner contends that Mr. Hoeferlin once expressed concern to Petitioner that an African-American female employee should be promoted for fear of a discrimination complaint from her. *See* Petition at p. 20. That allegation is pure hearsay. In addition, Petitioner's reckless implication that the employee somehow was not qualified for promotion is wholly insufficient to meet his burden of proof. *Marquez v. Bridgestone/Firestone, Inc.*, 353 F.3d 1037, 1038 (8th Cir. 2004). Not surprisingly, Petitioner also lacks any credible evidence to support his seemingly racist and sexist speculation. It is not evidence of reverse discrimination, let alone discrimination toward Petitioner, that Respondent promoted an African-American female. Perhaps to Petitioner's satisfaction, and no doubt unremarkable to this Court, Respondent has promoted many Caucasian employees. Accordingly, Petitioner cannot meet his burden of proof.

Assuming Petitioner could establish such background circumstances of reverse discrimination, the District Court and the Eighth Circuit found that his race discrimination allegations still fail for several reasons. *See* PA at p. 52. Specifically, the District Court found that Petitioner failed to articulate a *prima facie* case regarding failure to promote and to provide study materials for the same reasons as with Petitioner's claim of age discrimination. *Id.*

As for being removed from the Diversity Team, the District Court and the Eighth Circuit properly found that Petitioner's claim fails at the *prima facie* stage. *See* PA at p. 53-54. First, as discussed before, removal from the Diversity Team is not an adverse employment action. *See Higgins*, 2007 WL 817505 at *4-7. Second, Petitioner lacks any evidence that similarly situated individuals outside the protected class were treated better than he was.

Nearly the entire roster of the Diversity Team was changed. A restructuring of that team (reducing the number of members from thirteen to seven) and new requirements to be on the team, resulted in a removal of eleven out of thirteen team members. Thus, Petitioner was treated the same as any other member. Petitioner has failed to offer any evidence to the contrary, either before the District Court or on appeal.

Petitioner also lacks any evidence to meet his ultimate burden of proof as to his removal from the Diversity Team. Respondent instituted new requirements that were legitimate and served to improve the quality of that team. *See Cooney v. Union Pac. R.R. Co.*, 258 F.3d 731, 736 (8th Cir. 2001) ("A company's exercise of its business judgment is not a proper subject for judicial oversight") (internal citations omitted). Petitioner lacks any evidence suggesting that Respondent's reasoning is untruthful or that Petitioner was removed because he is Caucasian. Therefore, Petitioner's claims of reverse race discrimination do not warrant review by this Court.

## CONCLUSION

For the foregoing reasons, Petitioner's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF**
**MISSOURI EASTERN DIVISION**

| | | |
|---|---|---|
| RAD W. HAMILTON, | ) | |
| Plaintiff, | ) | |
| v. | ) | No. 4:04-CV-802 CAS |
| ENTERPRISE RENT-A-CAR, | ) | |
| Defendant. | ) | |

**MEMORANDUM AND ORDER**

(Filed Jan. 12, 2005)

This matter is before the Court on defendant Enterprise Leasing Company of St. Louis's ("Enterprise") motion to dismiss and/or strike plaintiff's complaint and motion to substitute proper party defendant and/or dismiss plaintiff's complaint. Plaintiff Rad Hamilton filed responses to these motions. For the following reasons, the Court will grant in part and deny in part defendant's motion to dismiss and grant defendant's motion to substitute proper party defendant.

## I. Background

Plaintiff's pro se complaint states that it is brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, and 42 U.S.C. § 1981. Plaintiff names Enterprise Rent-A-Car as the defendant. Plaintiff alleges his former employer Enterprise discriminated against him based on age, sex, race, and national origin. Plaintiff's allegations assert that Enterprise discriminated against him by forced termination from employment, failure to promote, failure

to provide study materials and review, hostile work environment, and promotion of younger workers. Plaintiff asserts that defendant's actions were a continuing violation.

Enterprise filed a motion to dismiss portions of plaintiff's complaint for failure to exhaust administrative remedies and failure to state a claim upon which relief can be granted on plaintiff's claims of race, sex, and national origin discrimination and plaintiff's claims of age discrimination occurring more than 300 days prior to the date plaintiff's charge questionnaire was filed. Plaintiff responds that he exhausted his administrative remedies regarding Title VII and that § 1981 does not require exhaustion of administrative remedies. Plaintiff also "reaffirms" his original pleading and requests that his response to the motion to dismiss be considered an amended pleading.

Enterprise also asks the Court to substitute it as the proper party defendant because plaintiff has named the wrong party. The caption states that the defendant's name is Enterprise Rent-A-Car. Enterprise states that its corporate name is Enterprise Leasing Company of St. Louis. Plaintiff asserts that he has not named the wrong party and opposes the motion.

## II. Legal Standard

The purpose of a motion to dismiss for failure to state a claim is to test the legal sufficiency of the complaint. A complaint shall not be dismissed for failure to state a claim for which relief can be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim entitling him to relief. *Conley v.*

*Gibson,* 355 U.S. 41, 45-46 (1957). The issue is not whether the plaintiff will ultimately prevail, but whether the plaintiff is entitled to present evidence in support of his claim. *Id.*; *see also Neitzke v. Williams,* 490 U.S. 319, 327 (1989). When ruling on a motion to dismiss, this Court must take the allegations of the complaint as true and liberally construe the complaint in a light most favorable to the plaintiff. *Kottschade v. City of Rochester,* 319 F.3d 1038, 1040 (8th Cir.), *cert. denied,* 124 S. Ct. 178 (2003).

Pro se pleadings are to be liberally construed and are held to less stringent standards than those drafted by an attorney. *Smith v. St. Bernards Reg'l Med. Ctr.,* 19 F.3d 1254, 1255 (8th Cir. 1994). Nevertheless, they must not be conclusory and must state specific facts which, when taken as true, state a claim as a matter of law. *Martin v. Sargent,* 780 F.2d 1334, 1337 (8th Cir. 1985); *Johnson v. Stark,* 717 F.2d 1550, 1552 (8th Cir. 1983) (citations omitted).

## III. Motion to Dismiss for Failure to Exhaust Administrative Remedies under Title VII and ADEA

Under Title VII, plaintiffs must follow administrative procedures and exhaust administrative remedies by timely filing a charge of discrimination with the EEOC before filing suit in federal court. 42 U.S.C. § 2000e-5(e)(1); *see E.E.O.C. v. Commercial Office Prods. Co.,* 486 U.S. 107, 110-12 (1988); *Shannon v. Ford Motor Co.,* 72 F.3d 678, 684 (8th Cir. 1996). The ADEA also requires exhaustion of administrative remedies by filing a charge of discrimination with the EEOC or Missouri Commission on Human Rights. *See* 29 U.S.C. § 626(d); Mo. Rev. Stat. § 213.075.1 (1994); *see Dring v. McDonnell Douglas Corp.,* 58 F.3d

1323, 1327 (8th Cir. 1995) (ADEA). "Exhaustion of administrative remedies is central to Title VII's statutory scheme because it provides the EEOC the first opportunity to investigate discriminatory practices and enables it to perform its roles of obtaining voluntary compliance and promoting conciliatory efforts." *Shannon,* 72 F.3d at 684 (quoting *Williams v. Little Rock Mun. Water Works,* 21 F.3d 218, 222 (8th Cir. 1994)). If a plaintiff were allowed to bring a claim outside the scope of the EEOC charge, it would "circumscribe the EEOC's investigatory and conciliatory role, as well as deprive the charged party of notice of the charge. . . ." *Williams,* 21 F.3d at 223 (quoting *Babrocky v. Jewel Food Co.,* 773 F.2d 857, 863 (7th Cir. 1985)). Courts recognize claims as exhausted when they have been actually filed before the EEOC or when they are "like or reasonably related to the allegations of the [administrative] charge." *Anderson v. Block,* 807 F.2d 145, 148 (8th Cir. 1986). The Eighth Circuit has held that claims are deemed to be like or reasonably related when they "could reasonably be expected to grow out of the charge of discrimination." *Cobb v. Stringer,* 850 F.2d 356, 359 (8th Cir. 1988) (quoting *Griffin v. Carlin,* 755 F.2d 1516, 1522 (11th Cir. 1985)).

### A. Title VII

Plaintiff's charge questionnaire filed with the EEOC asserts discrimination based on age and retaliation. Plaintiff's charge questionnaire[1] states:

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[1] Plaintiff did not file a charge of discrimination, but his charge questionnaire was filed under penalty of perjury. Defendant does not

(Continued on following page)

> Keith Hoeferlin stated "your [sic] to [sic] old and too slow" Matt is young and I've seen him whip through the extensions and claims so fast. My "MA" test was cancelled 5 times to prevent me from getting promoted. All 9 positions I applied for I'm told I don't qualify for anything.
>
> . . . .
>
> Continued issues of not qualified for any position without passing "MA" test cancelled 5 times.

Ex. A, pp. 2, 3.

The charge questionnaire also states that plaintiff believes he was discriminated against because he was the only 61 year old level 1 employee at Enterprise. (Ex. A, p. 4.) The charge questionnaire states that plaintiff was retaliated against because he was told that he was a "disgruntled employee" and "asked to leave Enterprise March 1, 2004." Plaintiff completed the questionnaire's sections on hiring and promotion and retaliation. Plaintiff also checked the boxes labeled "age" and "retaliation" in the appropriate sections of the questionnaire. Plaintiff did not check the boxes labeled race, sex, or national origin. Plaintiff did not fill out the section labeled harassment.

Plaintiff's complaint states that defendant discriminated against him on or about June 1, 1999 continuing through March 1, 2004, creating a hostile work environment and a continuing violation. (Comp. ¶ 5.) Plaintiff's complaint asserts that plaintiff was discriminated against

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assert that the charge intake questionnaire fails to satisfy Title VII's statutory regulation for an administrative charge of discrimination.

based on his age, sex, race, and national origin. (Compl. ¶ 10).

It is clear from plaintiff's charge questionnaire that he did not present any claims of race, sex, or national origin discrimination to the EEOC. Plaintiff's claims of race, sex, and national origin discrimination under Title VII are not like or reasonably related to the allegations in the administrative charge questionnaire. The scope of any subsequent federal court action is defined by claims encompassed within the prior EEO claim, and like or related matters that might be reasonably expected to be subject to the ensuing EEOC investigation growing out of the claims. *See Williams,* 21 F.3d at 222-23. Failure to pursue the administrative remedies to the extent required by the statute operates as a bar to judicial relief. *Miller v. Runyon,* 32 F.3d 386 (8th Cir. 1994); *see Briley v. Carlin,* 172 F.3d 567, 572-73 (8th Cir. 1999) (affirming grant of summary judgment based on failure to exhaust administrative remedies, as failure to promote claim was not related to plaintiff's EEO complaint concerning reduced duties). Therefore, the Court will grant defendant's motion to dismiss plaintiff's claims of discrimination based on race, sex, age, and national origin under Title VII.

### B. Age Discrimination Claims

Next, defendant asserts that plaintiff's claims of age discrimination occurring more than 300 days prior to the date of plaintiff's charge questionnaire should be dismissed as untimely because plaintiff has failed to exhaust his administrative remedies. Plaintiff does not assert that he is suing under the ADEA, however, giving his complaint the liberal construction due to pro se filings, the Court will

assume plaintiff is bringing his age discrimination claims under the ADEA instead of Title VII, as Title VII does not forbid employment discrimination based on age. 42 U.S.C. § 2000e-2(a). Plaintiff's charge questionnaire was filed March 9, 2004. In the charge he states several times that he was discriminated and retaliated against during the past four years. (Ex. A, pp. 3, 4, and 7). Plaintiff also asserts in his charge and complaint that defendant's actions were a continuing violation. (Compl. ¶ 12), (Ex. A, p. 3).

Under the ADEA, a plaintiff has 180 days to file a charge of discrimination with the EEOC after the date of the "alleged unlawful practice". 29 U.S.C. § 626(d)(2). Because Missouri also has a law prohibiting age-based discrimination, a plaintiff has 300 days from the date of the allegedly discriminatory action to file an EEOC charge. *Id.* The timely filing of a charge of discrimination with the EEOC is not a jurisdictional prerequisite to an action under the ADEA, but rather is treated like a statute of limitations and is subject to waiver, estoppel and equitable tolling. *Zipes v. Trans World Airlines, Inc.,* 455 U.S. 385, 393 (1982); *Dring v. McDonnell Douglas Corp.,* 58 F.3d 1323, 1327 (8th Cir. 1995). If a plaintiff fails to file a timely charge, his action is barred unless he can demonstrate that the limitations period is subject to equitable modification. *Dring,* 58 F.3d at 1327. Defendant asserts that denial of a promotion is a discrete event and not a continuing violation. The Court agrees. "Discrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify. Each incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable 'unlawful employment practice.'" *National Railroad Passenger Corp.*

*v. Morgan,* 536 U.S. 101, 114 (2002). Although plaintiff alleges that Enterprise discriminated against him for four years, he can only file a charge to cover discrete acts that occurred within the timely filing period. *Id.* Plaintiff's charge states that he applied for nine different positions, but does not provide the dates when he was denied each promotion. (Ex. A, p. 4). Plaintiff's complaint states that during the period from June 1, 1999 through March 1, 2004, he was denied approximately eight promotion opportunities. (Compl. ¶ 11). The Court finds that plaintiff has not exhausted his administrative remedies with respect to any failure to promote claims for any denial of promotions that occurred more than 300 days prior to the filing of his EEOC charge questionnaire. Therefore, the Court will grant defendant's motion to dismiss any ADEA age discrimination claims for failure to promote that occurred more than 300 days prior to the filing of plaintiff's EEOC charge questionnaire.

Defendant also states that plaintiff's allegations of age discrimination as to unlawful demotion and hostile work environment should be dismissed for failure to exhaust administrative remedies. Plaintiff's complaint alleges that he was demoted on October 1, 2001. (Compl. ¶ 11). He also alleges that there was a hostile work environment from June 1, 1999 through March 3, 2004. (Compl. ¶ 12). The EEOC charge does not contain these allegations, see Ex. A, and they are not like or related to the allegations in the EEOC charge. Therefore, the Court will dismiss plaintiff's claims of demotion and hostile work environment for failure to exhaust administrative remedies.

## IV. Section 1981

Plaintiff's complaint asserts that "this action is brought pursuant to . . . 'Section 1981' as amended. . . ." (Compl. ¶ 1). 42 U.S.C. § 1981(a) covers purely private acts of discrimination in the making and enforcement of contracts. *Griffin v. Pinkerton's, Inc.,* 173 F.3d 661, 664 (8th Cir. 1999). "Since the enactment of the 1991 Civil Rights Act, this provision has provided a basis for suits against employers for racial harassment on the job." *Id.* Although the typical § 1981 case involves discrimination against a minority race, the statute also protects white citizens from racial discrimination. *McDonald v. Santa Fe Trail Transp.,* 427 U.S. 273, 286-87 (1976).

Defendant asserts that plaintiff cannot recover for sex or national origin discrimination under § 1981 and plaintiff has not alleged any unlawful conduct based on race in the complaint. Plaintiff responds that there is a four-year statute of limitation under § 1981 and that his action under § 1981 is not restricted by a damages cap and "avoid[s] dealing with the EEOC." Defendant replies that they do not dispute plaintiff's argument, but plaintiff, who is white, has failed to allege a valid claim of race discrimination.

It is well established that § 1981 does not apply to discrimination based on sex. *Runyon v. McCrary,* 427 U.S. 160, 167 (1976). Also, a plaintiff cannot recover under § 1981 for discrimination based solely on the place or nation of his origin. *Saint Francis College v. Al-Khazraji,* 481 U.S. 604, 613 (1987). There is also no history of the statute being applied to age discrimination claims. Plaintiff's complaint mentions race once, stating he was discriminated against with respect to his race regarding the

allegations in paragraph nine of his complaint. (Compl. ¶ 10(c)). Paragraph nine states that Enterprise forced the termination of his employment, failed to promote plaintiff, failed to provide study material for promotion, failed to provide one-on-one study of review material with branch management, terminated plaintiff from Diversity Team, and admitted through its Group Rental Manager that Enterprise was out to get him terminated.[2]

Giving plaintiff's *pro se* pleadings a liberal construction, it does not appear beyond doubt that plaintiff cannot establish a prima facie case of reverse racial discrimination under § 1981. To the extent any of those claims are outside the statute of limitations under § 1981, they will be dismissed, as will plaintiff's claims of sex, age, and national origin discrimination which are not cognizable under § 1981. Otherwise, the Court will not dismiss plaintiff's § 1981 claim for reverse racial discrimination. Thus, defendant's motion to dismiss plaintiff's § 1981 claims will be granted in part and denied in part.

## V. Plaintiff's Request for Leave to Amend

Plaintiff requests in his response to the motion to dismiss that the Court "re-affirm" his original complaint "to include Section 1981 of the Civil Rights Act of 1964" and grant "this Amended pleading." First, plaintiff cannot amend his complaint in this manner. The Court does not permit supplements to complaints because it would cause confusion for the Court and the parties. In addition,

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[2] Plaintiff asserts other claims in ¶ 9, but the Court does not include them here because they specifically referenced age discrimination, which is not covered under § 1981.

plaintiff's requested amendments as contained in his opposition motion would not cure the defects of the original complaint, i.e., plaintiff's failure to exhaust administrative remedies as to his Title VII race, sex, and national origin claims; and the Court has already concluded that plaintiff has alleged a § 1981 claim. It is well-settled law that district courts have the power to deny leave to amend if the proposed changes would not remedy the deficiencies of the original complaint. *Weimer v. Amen,* 870 F.2d 1400, 1407 (8th Cir. 1989); *Norbeck v. Davenport Community School District,* 545 F.2d 63, 70 (8th Cir. 1976).

In the future, if plaintiff wishes to amend his complaint, he must file a motion for leave to amend the complaint with a copy of the proposed amended complaint attached. Plaintiff should be aware that any amended complaint would completely replace the original complaint because an amended complaint supercedes an original complaint and renders the original complaint without legal effect. *In re: Atlas Van Lines, Inc.,* 209 F.3d 1064, 1067 (8th Cir. 2000). In addition, the plaintiff may not reassert any claims in an amended complaint that this Court has dismissed.

## VI. Proper Party Defendant

Enterprise requests that the Court substitute it as the proper party defendant or dismiss plaintiff's complaint for failure to sue the proper party. Defendant affirms that its legal corporate name is Enterprise Leasing Company of St. Louis. *See* Weiss Aff. Plaintiff has sued defendant as Enterprise Rent-A-Car. Plaintiff contends that defendant is doing business as Enterprise Rent-A-Car in every state

and that all of plaintiff's documentation from defendant has Enterprise Rent-A-Car on it.

A corporation has the right to be accurately named in the process and pleadings of the court. *Roberts v. Michaels,* 219 F.3d 775, 778 (8th Cir. 2000) (quoting *United States v. A.H. Fischer Lumber Co.,* 162 F.2d 872, 873-74) (4th Cir. 1947)). The Court will order the Clerk of Court to change the caption in this case to reflect defendant's proper name.

## VII. Conclusion

In conclusion, defendant's motion to dismiss plaintiff's claims of age, sex, race, and national origin discrimination under Title VII will be granted. Defendant's motion to dismiss plaintiff's allegations of age discrimination under the ADEA that occurred more than 300 days prior to the filing of plaintiff's EEOC charge questionnaire is granted. Defendant's motion to dismiss plaintiff's claims of age discrimination regarding his demotion and a hostile work environment is granted for failure to exhaust administrative remedies. Defendant's motion to dismiss plaintiff's § 1981 claims that are outside the statute of limitations is granted and defendant's motion to dismiss plaintiff's remaining § 1981 claims is denied. Defendant's motion to substitute the proper party defendant will be granted. The remaining actionable claims in plaintiff's complaint are his claims of failure to promote based on age that occurred no more than 300 days prior to the date his EEOC charge was filed, plaintiff's claim of forced resignation due to age, and plaintiff's § 1981 reverse race discrimination claim that is within the statute of limitations.

Accordingly,

**IT IS HEREBY ORDERED** that defendant's motion to dismiss is **GRANTED in part and DENIED in part** as set forth in this memorandum and order. [Doc. 10]

**IT IS FURTHER ORDERED** that defendant's motion to substitute proper party defendant is **GRANTED**. [Doc. 18]

**IT IS FURTHER ORDERED** that the Clerk of Court is ordered to change the caption of this case to read as follows: "Rad W. Hamilton, Plaintiff, v. Enterprise Leasing Company of St. Louis, Defendant." The parties shall use this amended caption in all future filings.

An order of partial dismissal will accompany this memorandum and order.

/s/ Charles A. Shaw
**CHARLES A. SHAW**
**UNITED STATES**
**DISTRICT JUDGE**

Dated this 12th day of January, 2005.

**In the**
**United States Court Appeals**
**For the Eighth Circuit**

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**Case Number: 05-4098**

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**Rad W. Hamilton**

**Plaintiff-Appellant**

**VERSES** [sic]

**Enterprise Leasing Company**
**Of St. Louis**

**Defendant-Appellee**

**Appeal from the United States District Court**
**for the Eastern District of Missouri**
**Eastern Division**
**No.4:04-CV-802 CAS**

**PURSUIANT** [sic] **TO THE SUPREME COURT RULING ON JUNE 22, 2006 REGARDING THE CIVIL RIGHTS ACT OF 1964 THE FOLLOWING BRIEF IS RESPECTFULLY AMENDED**

## APPELLANT'S OPPOSITION TO DISTRICT COURT'S MOTION GRANTING SUMMARY JUDGMENT TO APPELLEE

**COMES NOW**, Appellant respectfully requesting the Eighth Circuit Court of Appeals apply the Supreme Court's ruling that strengthens civil rights on the job resulting from a 9-0 ruling upheld June 22, 2006 that bars employers from discriminating against employees who complain of discrimination that applies to claims of discrimination based on race, religion, ethnicity, age or disability. In the case now before the court Enterprise

retaliated against Appellant after complaining that Keith Hoeferlin told Appellant that, "he was to old and to slow." Appellant was subsequently denied the opportunity to take the MA Test required for promotions within the Enterprise system. During the next five years Appellant was repeatedly denied promotions and was demoted to the call center. Appellant has repeatedly brought this to the attention of the District Court in Appellants original pleadings and the motion now before the Eight Circuit Court.

In light of the Supreme Court's ruling on June 22, 2006 Appellant respectfully request the Eight Circuit Court remand this case to trial considering the age of the Appellant (60) being a 5 year level one employee who Enterprise has admitted that Appellant was not qualified for any promotions without passing the required MA test to be qualified for a promotion that was intentionally denied to the Appellant by Enterprise. This 9-0 ruling clearly rules that Enterprise discriminated against the Appellant based on age, denying him promotions and demoting the Appellant in retaliating against Appellant for filing a discrimination complaint to management. Enterprise responded by shifting him to a less appealing job without any opportunity to be promoted for over a period of five years. With the ruling for the Supreme Court on June 22, 206 [sic] the District Courts Motion of Summary Judgment for the Appellee should be overturned as the District Court erred from case law referenced in the Appellants original brief Dated December 28, 2005.

In this case the District Court has prohibited the Appellant from establishing, "by case law" the right to a trial that reveals the existence of "genuine issues as to material fact that now exists" as outlined in the New ruling from

the Supreme Court for the Appellants case now before the Eight Circuit Court.

**THEREFORE**, the Appellant respectfully request that the 8th Circuit Court of Appeals remand this case to trial so a jury can decide this case given the ruling from The Supreme Court on June 22, 2006. Signed this 23rd day of June 2006.

Respectfully Submitted,

/s/ Rad W. Hamilton
Rad W. Hamilton, pro se
Appellant

**Certificate of Service:**

I hereby certify that a copy of the foregoing was mailed first class on June 23, 2006.

Randall Thompson
Attorney at Law
720 Olive Street, Suite 2400
St. Louis, Missouri 63101

/s/ Rad W. Hamilton
Rad W. Hamilton
Appellant

**Supreme Court ruling strengthens civil rights on job**

**By David G. Savage**
LOS ANGELES TIMES

**WASHINGTON** • The Supreme Court strengthened the enforcement of civil rights laws in the workplace by ruling Thursday that employers may not punish workers who file discrimination complaints by shifting them to a less appealing job.

The 9-0 ruling upheld a verdict in favor of a woman who was removed from her job as a railroad forklift operator after complaining of sexual harassment. She was reassigned to more arduous work on a track-repair crew.

In the Civil Rights Act of 1964, Congress made it illegal for employers to retaliate against employees who complain of discrimination. But until Thursday, the Supreme Court had never defined what was meant by retaliation.

The justices rejected the arguments of business lawyers who argued that "minor changes in work assignments" should not be deemed illegal simply because an employee complains of discrimination. Instead, they set a rule that bars all but trivial actions against a complaining employee.

In general, employers want to stop such complaints before they reach a jury, because the cases then can result in large damage awards.

Thursday's decision arose from a case of sex discrimination, but it applies also to claims of discrimination based on race, religion, ethnicity, age or disability. White, who in the summer of 1997 was the only woman on a Burlington Northern & Santa Fe maintenance crew in Memphis,

Tenn. After a few months, she told her supervisor that her foreman was making sexist comments and off-color jokes – along with remarks, echoed by other workers, that a woman did not belong there.

The foreman was suspended for 10 days, but the supervisor also removed White from the forklift and reassigned her to a track crew at the same pay. She called the Equal Employment Opportunity Commission.

A jury ruled against her on her complaint of sex discrimination. But it ordered the railroad to pay her $43,000 in damages for the retaliation.

In their appeal to the Supreme Court, lawyers for the railroad noted that in 2004 alone, more than 20,000 discrimination claims citing retaliation had been filed. They argued in vain, that claims should be restricted to major actions, such as a firing or demotion.

In other decisions Thursday, the justices:

• Ruled 7-2 that defendants, not prosecutors, have the burden of proving in federal trials that they had committed a crime under duress.

• Said in a 6-3 ruling that a California inmate had to go through a prison grievance system before bringing a suit claiming he had been wrongly punished.